STATE OF MICHIGAN

COURT OF APPEALS

CRAIG MAGHIELSE and DEBORAH MAGHIELSE, Plaintiffs-Appellants, v HELEN VAN'T HOF, Defendant-Appellee.	UNPUBLISHED November 8, 2011 No. 299915 Newaygo Circuit Court LC No. 2010-019567-CH

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's denial of their motion for a preliminary injunction and its accompanying *sua sponte* dismissal of their case. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Plaintiffs own a waterfront parcel of land on Pickeral Lake, and defendant owns the non-waterfront parcel of land directly behind plaintiff's parcel. In 2006, the parties were involved in a legal dispute over the ownership of a piece of land that abuts the lake. They ultimately settled the lawsuit by entering into a waterfront access easement agreement whereby plaintiffs granted defendant access to the lake through an easement across their property, subject to certain restrictions. According to plaintiffs, since 2008 defendant has continually violated the restrictions and requirements of the easement. Plaintiffs thus initiated the instant action seeking specific performance of the easement requirements by way of a preliminary and a permanent injunction prohibiting defendant from violating the easement restrictions. Plaintiffs also sought declaratory and injunctive relief concerning use of the easement in the event defendant's property is used, in the future, as anything except a single family residence.

Within a week of filing their complaint, plaintiffs moved for a preliminary injunction requesting that the court preliminarily enjoin defendant from engaging in certain activities that they asserted were violative of the easement restrictions set forth in the waterfront access agreement. The trial court held a hearing on plaintiffs' motion, at which plaintiff, Craig Maghielse, was allowed to provide a limited amount of testimony concerning the claimed easement violations. At the conclusion of the hearing, the trial court not only denied the motion, but *sua sponte* dismissed plaintiffs' case. Plaintiffs now appeal those decisions.

This Court reviews the denial of injunctive relief for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). A trial court's interpretation of an easement is a question of law that we review de novo. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). The extent of a party's rights under an easement, however, is a question of fact that this Court reviews for clear error. *Blackhawk Dev Corp v Dexter Village*, 473 Mich 33, 40; 700 NW2d 364 (2005). Similarly, whether the scope of an easement has been exceeded is generally a question of fact. See *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928). However, when reasonable minds could not disagree concerning these issues, they should be decided by the court on summary disposition as a matter of law. See *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995).

As recently expressed in *Wiggins v City of Burton*, __Mich App __; __ NW2d __ (2010):

> The language of an express easement is interpreted according to rules similar to those used for the interpretation of contracts. See *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003); *Anglers of the Ausable, Inc v Dep't of Environmental Quality*, 283 Mich App 115, 129–130; 770 NW2d 359 (2009), rev'd in part on other grounds —— Mich —— (2010). Accordingly, in ascertaining the scope and extent of an easement, it is necessary to determine the true intent of the parties at the time the easement was created. *Hasselbring v Koepke*, 263 Mich 466, 477–478; 248 NW 869 (1933). Courts should begin by examining the plain language of the easement, itself. *Little*, 468 Mich at 700. If the language of the easement is clear, "it is to be enforced as written and no further inquiry is permitted." *Id.*

A party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued. MCR 3.310(A)(4). In determining whether to issue a preliminary injunction, a court must consider four factors: (1) harm to the public if the injunction issues; (2) whether harm to the applicant absent temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998). "[A] particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction. The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Local 376*, 482 Mich at 9.

In the present matter, the trial court did not articulate any consideration of the four factors necessary to a determination of whether a preliminary injunction should issue. From its dismissal of the case, it necessarily determined that plaintiffs would not likely succeed on the merits (factor three), but it engaged in no analysis concerning the potential harm to plaintiffs, defendant or the public if the injunction were or were not to issue, nor did it address the possibility of irreparable injury. That being so, it is difficult, if not impossible, to approach this appeal in the manner in which we would traditionally address appeals from preliminary injunction determinations. From our review of the record, it appears more as though the trial court treated plaintiffs' motion as a motion for summary disposition, and disposed of the same in defendant's favor. That, then, is how we shall proceed in our review on appeal.

A grant or denial of summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id.* at 119. The motion should be granted only when the claim is so legally deficient that recovery would be impossible even if all well-pleaded factual allegations were true and viewed in the light most favorable to the nonmoving party. *Id.* When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Human Servs Dep't*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

In its singular order denying plaintiffs' motion for a preliminary injunction and summarily dismissing their lawsuit, the trial court declared the meanings of several terms contained within the parties' waterfront access agreement. It is with these meanings that plaintiffs allege several points of error. First, plaintiffs assert that the trial court erred in concluding that the easement agreement did not require that an adult be physically present with a minor to supervise the minor while he or she is using the easement area. On this issue, the trial court's order contains the following language:

> (c) The language of ¶ 10 of the Waterfront Access Easement, stating that "adult supervision shall be present when minors are using the Easement area," is satisfied as long as an adult representative of the Grantee Parcel is either on the Easement or on the Grantee Parcel to provide the required supervision.

According to plaintiffs, to adopt the above definition is to reject the plain language of the easement agreement and the ordinary meaning afforded the term "present." Plaintiffs contend that the easement agreement requires that an adult be actually physically present on the easement when a minor is using the same. We agree.

In reaching its conclusion that the term "present" in the above provision requires merely that an adult be on the easement or on defendant's property the trial court stated:

> I think essentially you're looking at a situation where the level of supervision is one for the parents to determine. Obviously if you've got two (2) year olds and things of this nature I think that would be one situation where they would want to be right down there on the property. If you've got fifteen (15) year olds down there with a fishing pole, I think that level of supervision is certainly much more relaxed and that could be done by the fact that they are present on the property or the home estate.

The flaw that we perceive with this analysis is that it essentially renders the provision requiring that adult supervision be present for minors using the easement meaningless. Obviously, adult supervision would be physically present for a two-year-old at all times whether near a lake or at a home. It would hardly need to be spelled out in an easement agreement that an adult should be

physically present to supervise a toddler near the waterfront. We assume that all provisions were placed in the agreement for a reason, and the requirement for adult presence for minors would thus be for the non-obvious (i.e., for those minors who did not *require* physical presence to attend to their basic needs). Were the physical presence of an adult to be left to the discretion of a parent, as concluded by the trial court, it could have been specified as such in the easement agreement. That it was not, leaves us to conclude that presence was meant to apply consistent with its common, ordinary meaning.

Black's Law Dictionary, 7th Ed., defines "present" as "in attendance; not elsewhere." *The American Heritage Dictionary of the English Language (4th Ed*) similarly defines "present" as "being at hand or in attendance." Considering that the easement at issue is approximately 100 feet in length and that defendant's home sits behind plaintiff's home, farther away from the easement and the water, we are satisfied that one could not be "at hand" or "in attendance" without being physically present. Thus, the trial court erred in failing to apply the plain, unambiguous meaning of the contractual language in this instance.

Plaintiff next avers that the trial court erred in its interpretation of the word "family" as it appears in the easement agreement given that the meaning of the term was not a subject of debate for purposes of the motion hearing and because there is a factual dispute concerning the term's meaning. We agree that, under the circumstances, further clarification of the term is needed.

In its order, the trial court defined the term "family" for purposes of the parties' agreement as including "the extended family of the owner(s) of the Grantee parcel." Unfortunately, the term "extended family" does little to clarify the specific group of people intended to be included within such class.

The parties in this case obviously harbor animosity toward each other and have difficulty agreeing on even the smallest detail of the easement agreement. The parties took extreme opposite stances on what the term "family" was intended to encompass in the agreement, with plaintiff contending that the term was intended to include only defendant and her children and defendant countering that the term included those with whom she shared such a long relationship that they felt like family to her, though they shared no blood ties. Given such divergent opinions, the trial court's definition of family to simply mean "extended family" does nothing but ensure that the parties will be back before the court to dispute who qualifies as an extended family member. Just as a family member could be limited to one's immediate family or to extended family, and extended family member could be limited to a grandchild, cousin, or someone else with whom one shares a bloodline, or could include an "in-law," or both. Lacking a specific designation as to whom is an extended family member for purposes of the parties' easement agreement, remand is necessary for the trial court to clarify this definition.

Plaintiffs next claim that the trial court erred in its conclusion that dogs were not precluded from being present in the easement. We disagree.

At the hearing on plaintiffs' motion, the issue of defendant's dogs and their family or friend's dogs being on the easement and coming on to plaintiffs' property was brought to the trial court's attention. Plaintiffs asserted that dogs were not allowed on the easement, and the trial

court indicated that dogs had nothing to do with the lawsuit relative to the easement. Consistent with its finding, the trial court's order contained the following provision: "Grantee's use of the [e]asement by dogs is not regulated by the terms of the Waterfront Access Easement."

Plaintiffs cite two reasons that the trial court's determination regarding dogs was in error. First, plaintiffs direct this Court to a provision in the easement agreement providing that the owner of the parcel "shall have use of the [e]asement to get to the beach and the water by pedestrian access and with the use of wagons, golf carts, and tractor mowers, provided said use of wagons, golf carts and tractor mowers is limited to sunrise to sunset." According to plaintiffs, this provision necessarily limits use of the easement only to humans, i.e., pedestrians and those capable of operating wagons and golf carts. However, it is apparent from the reading of the paragraph referenced by plaintiffs that use of the word "pedestrian" followed immediately by reference to the allowance of other very specific methods of transport was intended to limit the transportation across and through the easement by wheeled or motor vehicles. This is made obvious by the very sentence itself, as well as the fact that the following sentence provides that no other vehicles or apparatus with any type of motor shall use the easement for access to the beach and waterfront without plaintiffs' prior approval. It is nonsensical to read the paragraph as a limitation on the species that may use the easement as plaintiffs would have us do.

Plaintiffs also assert that because dogs were not expressly included in the easement agreement, they are not allowed to use it. However, the converse could also be argued—that if dogs are not expressly prohibited from using the easement they are not excluded for using the same. This is an especially strong argument when one considers that plaintiffs did take the time to provide for exclusions in the easement. For example, the easement agreement contains a provision explicitly precluding the placement of fire pits in the easement. Thus, if dogs were to be expressly excluded from the easement, language providing for the same could have been spelled out in the agreement. That the parties elected not to expressly exclude dogs from the easement compels us to find no error in the trial court's conclusion that dogs are not prohibited from being in the easement.

Plaintiffs next assert that defendant and her family's past behavior is relevant in determining whether they violated the provision of the easement agreement that requires defendant to treat plaintiffs with courtesy and respect and the trial court's refusal to hear such evidence constituted an abuse of discretion. We agree.

The easement agreement contained the following provision: "Grantee and Grantee's guests agree that at all times they will treat neighbors with respect and courtesy." While plaintiff, Craig Maghielse, gave some testimony at the motion hearing concerning certain behavior that plaintiffs contend violated the above provision, the trial court's order contained the following language:

> The Court hereby declares that the Waterfront Access Easement does not govern the behavior or the conduct of persons who use the [e]asement, and so will not receive any testimony or evidence bearing on the past behavior or conduct of Grantee, Grantee's family or Grantee's guests, in their use of the [e]asement.

There is no explanation for this holding on the record. While the trial court acknowledges certain restrictions on conduct in the easement (for example, prohibiting fires and the driving of motor vehicles at night) and agrees that the same would be binding, it wholly dispenses with the provision requiring respectful and courteous behavior. While such behavior is admittedly highly subjective and this Court professes no immediate opinion on the parties' intent with respect to such terms, neither does it find appropriate the discarding of the provision without any analysis or discussion whatsoever. The easement agreement clearly does govern the behavior of defendant and her guests, and for the trial court to rule that it does not is to ignore the plain language of the agreement. To further hold that defendant's past conduct in her use of the easement is irrelevant in determining whether she violated the easement agreement serves to ignore the plain, unambiguous language of the agreement. The trial court was asked to determine whether defendant violated the easement agreement and, if so, to enjoin her from doing so in the future. To make such a determination, the trial court must necessarily look at defendant's specific conduct to determine whether she comported with the easement requirements, one of which required that at least she "treat neighbors with respect and courtesy." The court's failure to do so constituted an abuse of discretion. Remand is thus necessary for the trial court to make proper determinations on this issue.

Plaintiffs also assert as error the trial court's refusal to enforce any requirement of the easement agreement for which there was also a criminal penalty. Specifically, plaintiffs contend that despite the fact that criminal penalties may, in fact, exist with respect to defendant's (or her guests) dogs coming onto their property or defendant (or her guests) behaving in a disrespectful or discourteous manner, provisions prohibiting the same conduct are also court-enforceable provisions of the easement agreement. We agree, in part.

As to the issue concerning dogs, we have already determined that the easement agreement does not prohibit dogs from being in the easement itself. And, the easement agreement does not concern itself with plaintiffs' property outside of the easement. To the extent that plaintiffs' complaint stems from the dogs coming onto their property and outside of the easement, then, such behavior is not governed by the easement agreement. As indicated above, however, defendant agreed to be contractually bound to treat her neighbors with courtesy and respect. What this requirement entails and whether defendant did so are issues to be addressed by the trial court on remand.

Plaintiffs next assert that the trial court abused its discretion in refusing to enter a preliminary injunction to enjoin defendant's violations of the easement agreement. We disagree.

As previously indicated "a particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). "When an injury is irreparable, the interference is of a permanent or continuous character, or the remedy at law will not afford adequate relief, a bill for an injunction is an appropriate remedy." *Schadewald v Brule*, 225 Mich App 26, 40; 570 NW2d 788 (1997).

Concerning harm, plaintiffs stated that they were forced to suffer through an ongoing disruption of peaceable enjoyment of their property through the summer season by virtue of minors using the easement while unaccompanied by an adult, dogs on the easement, guests of

defendant using the easement while neither defendant nor a member of her family was present, and a few incidents of defendant's guests being disrespectful to plaintiffs. According to plaintiffs, absent an injunction the same harm would occur in the summer of 2011. This does not appear to be a permanent or continuous interference and there is no assertion that plaintiffs have no adequate remedy at law, absent an injunction.

Moreover, defendant denies that the above claimed restrictions are consistent with the easement language as claimed by plaintiffs. Given that the purpose of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights (*Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655-656; 588 NW2d 133 (1999)), and that the status quo since the easement agreement was signed was apparently that defendant would engage in the activities complained of by plaintiffs, the status quo would be maintained in favor of defendant's current actions. Plaintiffs did not demonstrate the need for the extraordinary relief of a preliminary injunction.

Plaintiffs also claim that the trial court erred in refusing to enter an injunction restricting the use of the easement by vehicles. In asserting this error, plaintiff rely upon the provision of the easement agreement providing that "continued documented and reported violations of the above restrictions by the owner of the Grantee Parcel or guests thereof shall automatically be grounds for restricting access to the Easement by use of any vehicle." By its express terms, documented and reported violations of easements restrictions shall merely be *grounds* for restricting access by use of vehicles. The easement agreement does not provide that access by vehicle *shall* be restricted if violations are found. Moreover, the trial court did not unequivocally determine that any violations occurred. Instead, it interpreted the meaning of specific terms of the easement agreement that the parties disputed. We thus find no error on this issue. If, on remand, the trial court determines that continued violations of the easement agreement occurred it may also consider whether to restrict access by use of vehicles.

Plaintiffs additionally assert that the trial court erred in failing to award plaintiffs their costs and attorney fees. Plaintiffs contend that because the easement agreement provides for the recovery of costs and actual attorney fees by a party who is successful in obtaining enforcement of the easement in a court action and they should have been successful in their injunction action, they are entitled to their costs and fees. We disagree.

Again, plaintiffs were unsuccessful in obtaining enforcement of the easement and did not demonstrate that they should have obtained a preliminary injunction. Moreover, this action primarily sought a declaration of the rights and responsibilities of the parties concerning an easement agreement. Intertwined with the declaration was the court's necessary interpretation of specific terms and provisions in the easement agreement. Though it did find that defendant's interpretation of one of the contested provisions of the easement agreement was incorrect, the trial court made no determination as to whether defendant had violated the terms of the easement agreement to that point. It thus did not "enforce" the easement—it merely interpreted it. On those facts, an award of fees and costs was not warranted. On remand, the trial court shall determine whether the agreement was violated and, if so, whether an award of fees and costs is appropriate.

Finally, plaintiffs object to the trial court's sua sponte dismissal of their complaint, particularly when all of their claims were not raised or decided in the motion hearing. We agree.

Under MCR 2.116(I)(1), a trial court has authority to grant summary disposition sua sponte as long as either the pleadings show that a party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). However, a court may not dispense with the basic requirement of providing a party with a meaningful opportunity to be heard. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

In their complaint, plaintiffs alleged that defendant breached the easement agreement and sought specific performance of the same. The allegations included those violations addressed by the trial court in plaintiffs' motion for preliminary injunction as well as an allegation that the easement was not being used as an appurtenant to a single family residential use of defendant's parcel in violation of the agreement. This last allegation was not addressed by the trial court at the hearing, nor was it addressed in the order dismissing plaintiffs' complaint. Plaintiffs thus had no meaningful opportunity to be heard on this issue.

Moreover, it appears that the trial court, at least in part, simply wanted to get the entire matter to this Court as quickly as possible. At the motion hearing the court stated, " . . . the Court will also rule further and on its own motion dismiss the lawsuit summarily, so that will get you to the Court of Appeals and the Court of Appeals can decide what they meant by family members and things of this nature. Mr. Redick, I just saved you an argument." Dismissing a case in an effort to have this Court resolve issues in the first instance does not meet with our approval. Dismissal of plaintiffs' entire complaint without consideration of each claim was in error.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. Neither party having prevailed on appeal, neither party may tax costs under MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause